No. 518

DEC 29 1952

IN THE

Supreme Court of the United States

October Term, 1952.

DEENA ARTWARE, INCORPCRATED, - Appellant,

versus

NATIONAL LABOR RELATIONS BOARD, - Appellee.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT,

AND

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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DEENA ARTWARE, INCORPORATED, - - *Appellant,*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Appellee.*

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner, Deena Artware, Incorporated, prays that writ of certiorari, issue to review the judgment of the United States Court of Appeals for the Sixth Circuit. The opinion below is reported in 198 F. 2d 645.

STATEMENT.

In the building marked "existing Deena plant" on the plat, page 20, petitioner manufactured pottery lamp bases. On the plat marked "area of new construction" across a 50-foot railroad right of way from

the pottery plant, it began construction, through an independent contractor of a new plant, where the pottery lamp bases could be wired, finished and made ready for sale. Because a member of the Federal Department of Mediation and Conciliation failed to notify a Union official of his postponement for two (2) days of a meeting before him of the Union and Company bargaining committees, the Union went on strike. It picketed the existing plant and extended its picket lines so as to surround the new construction work and force the general contractor to stop work.

Petitioner sued the unions and recovered judgment for damages resulting from this secondary boycott. The judgment was affirmed. *United Brick & Clay Workers of America, et al.,* v. *Deena Artware, Inc.,* 198 F. 2d 637. Certiorari was denied December 8, 1952. The National Labor Relations Board, considering the idenitcal facts, held that there was no secondary boycott. Enforcement of the Board's ruling was ordered in spite of the obvious inconsistency in its findings of fact and prior judgment of the District Court. The Board also attributed the strike to unfair labor practices of petitioner, and ordered reinstatement of employees and payment of wages lost since May 26, 1948. Petitioner seeks a review of the judgment of the lower Court ordering enforcement of the Board's order.

JURISDICTION.

Jurisdiction is granted by *Title 29, Section 160(e), U. S. C. A., Section 10(e)*, of the Labor Management Relations Act, providing that the order of the United States Court of Appeals is subject to review upon writ of certiorari, as provided in *Sections 239, 240 of the Judicial Code as amended (Title 28, Sections 346 and 374 U. S. C. A.)*.

QUESTIONS PRESENTED.

I.

Is the judgment of the lower court establishing as the ultimate essential fact that picketing the area of new construction was a secondary boycott and awarding petitioner damages therefor res judicata in a proceeding before National Labor Relations Board in which the Union (defendant in the damage action) is the charging party and petitioner the respondent?

This question of Federal law has not been settled by this Court.

II.

Where the charge and complaint allege that unfair labor practices began on or about April 8th, and continued thereafter, should the charges be sustained on evidence of statements made by petitioner's President on several dates prior thereto?

Petitioner claims that this is analogous to a conviction upon a charge not made in conflict with applicable decisions of this Court.

III.

Should a work stoppage, resulting directly and immediately from the failure of a Conciliator to notify a Union official of the postponement of a bargaining meeting, the petitioner being entirely free from fault in the matter, be considered an unfair labor practice strike?

Petitioner contends that there can be no inadvertent or innocent unfair labor practice, and that the enormous penalty of rehiring and paying back wages to numerous employees for more than four and one-half (4½) years, should not be approved or enforced by a Court.

REASONS FOR ALLOWANCE OF WRIT.

I.

Controversies between labor and management frequently involve unfair labor practice charges and actions for damages, as authorized by the *Labor Management Relations Act. Title 29, Sec. 187, U. S. C. A.* Whether the action in the District Court involves the boycotts or jurisdictional disputes referred to in Section 187, or a violation of contract referred to in *Section 185 of Title 29,* different conclusions will frequently be reached by an impartial court on the one hand and the National Labor Relations Board, whose representatives have investigated charges, and caused complaint to be issued on the other hand. The affirming by the United States Court of Appeals of two decisions, upholding contrary and irreconcilable conclusions of fact is undesirable. This inconsistency can be avoided by applying the basic principles of *res judicata,* when such conflicting conclusions are considered

by the same Court. In this case, the judgment for damages was necessarily based upon the finding that there had been a secondary boycott. The United States Court of Appeals did not agree with the ruling of the Board as a matter of law. Nevertheless, they ordered enforcement of this ruling. 198 F. 2d 653. The privity between the defendant Union in one case, and the charging Union, acting through National Labor Relations Board, as its representative in the other is obvious.

II.

The unfair labor practice charge is not a pleading. It becomes the basis of the complaint, however, and the respondent must look to the complaint to find the case he must meet. The unfair labor practice charges are set out in Paragraph 6 (Record, page 41) and Paragraph 11 (Record, page 43) of the complaint. Both paragraphs began as follows:

> "Commencing on or about April 8, 1948, and at all times, thereafter, the respondent, by its officers and agents * * *."

The complaint was directed against the bargaining meetings and petitioner prepared to meet this issue. The charges were sustained on the basis of evidence of remarks made by petitioner's President prior to the above date, having nothing to do with the bargaining meetings, and an interview given to a Paducah newspaper by the President, after all of the events referred to in evidence had transpired. Petitioner

should be permitted to rely upon the statement made against him. He should not be required to meet charges not made. In the attached brief, we will point out the language of the opinion in the lower court, showing that the findings against petitioner were not based on the conduct of the bargaining, the offense really charged.

III.

In the attached brief, we will point out in the opinion of the lower court a finding that there was no justification on the part of the employees in imputing to the petitioner any fault in failing to notify a union official of the postponement of the meeting set for May 26th. Neither the Board nor the Court found that petitioner was at fault in this matter. The finding that "fault on the part of the respondent is not a necessary element" is erroneous. An unfair labor practice is a wrongful act. Otherwise the heavy penalty, by whatever name called, should not be imposed.

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Attorney for Appellant.

IN THE

Supreme Court of the United States

October Term, 1952.

DEENA ARTWARE, INCORPORATED, - - *Appellant,*

v.

NATIONAL LABOR RELATIONS BOARD, - *Appellee.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT.

In December, 1947, petitioner entered into a contract with Vandevelde and Augustus, of Paducah, Kentucky, for the construction of a plant on the ground marked "area of new construction" on the plat. In March, 1948, at a consent election conducted at petitioner's existing plant by National Labor Relations Board, petitioner's employees selected United Brick & Clay Workers Union as their bargaining representative. Petitioner thereupon designated its Manager, Corbin Meriwether, its Director of Personnel, Mrs. Kathryn Hendron, and an office employee, Mrs. Lenola Henson, as its bargaining committee. The Union Com-

mittee of ten, with its International representative, Earl Bellew, and the Employer's Committee, held eight meetings, some of them lasting as long as four (4) hours. Agreements were reached and reduced to writing on some points. There was no final agreement, however, on a completed contract. In May, 1948, the union committee stated in substance that they wished to call upon a representative of the Department of Mediation and Conciliation to assist them. No objection being made to this, a meeting was scheduled to be held with the Conciliator, Garth K. Ferguson, at the offices of petitioner's attorneys, on May 26, 1948. Later, the Conciliator desired to postpone the meeting to May 28th. He notified the management committee, and stated that he would notify the Union Committee, including Bellew, the International representative, whose home was at Olive Hill, Kentucky. Bellew failed to get the notice until it was too late to prevent his making a trip to Paducah two (2) days earlier than necessary. When he learned at the attorneys' office that the meeting had been postponed, he discussed the matter with members of his committee, and determined to call a strike. At 1:45 o'clock that day three members of the committee notified the Manager of the plant that they would walk out fifteen (15) minutes later, at two (2) o'clock. The Manager protested, explaining that petitioner was in no way at fault, and should not be held responsible for a mistake of the Conciliator. Nevertheless, approximately fifty-seven (57) employees, more than one-half (½) of those employed at the plant, quit work at two (2) o'clock on

that day. Their checks were delivered to them within the next hour and when, two (2) days later, they offered to return to work if the employer would bargain about the charge of nine (9) employees who had been discharged in April, they were told that they were no longer in the employ of the Company. During the bargaining negotiations, nine (9) members of the Union Committee had been discharged for flagrant disobedience of orders. This action was not disapproved by National Labor Relations Board, though it was the subject of a charge. The bargaining sessions continued after the discharge of the nine (9) employees. Petitioner contends that the employees who quit work at 2 P. M., May 26, 1948, were ordered to walk out solely because Earl Bellew failed to receive notice of the postponement of the meeting.

Shortly after the events of May 26, 1948, United Brick & Clay Workers Union, under the direction of its own committees, Earl Bellew, its International representative, and Edmund Grimes, an A. F. of L. Organizer, began picketing. The construction work on the new plant east of the existing pottery plant, had progressed to the point where the foundation had been laid, and the contractors had prepared to begin the erection of the structural steel. The general contractors in charge of the work were Vandevelde & Augustus. The subcontractor, in charge of the erection of steel, was R. C. Jennings, whose superintendent was H. A. Downs. None of these parties Vandevelde & Augustus, R. C. Jennings, or H. A. Downs, had any dispute with their employees (R. 729, 797). When,

about June 1, 1948, carloads of structural steel, to be used in the construction of the building, were placed on the side track, which had already been constructed at the building site the union caused the picket line to be extended so as to include within it the construction work. In order to stop work on the new addition, the pickets walked east on Ohio Street to Second, along Second to Jackson Street to the right of way of the N. C. & St. L. Railway, and back along that right of way to Ohio Street. This picketing of the construction work was largely done by the United Brick & Clay Workers, under the leadership of Earl Bellew, and A. F. of L. Organizer, Edmund Grimes. Injunction orders were obtained against violence in the Circuit Court of McCracken County, Kentucky. Finally an order was obtained against the picketing of the new construction work. Shortly after this order was issued against the United Brick and Clay Workers Union, the Teamsters' Union began picketing the construction site, and kept it up until the work was finally abandoned. Signs carried by picketers bore the words "respect the picket line" (R. 796). The picketing was not continuous, but was resumed whenever Downs, Superintendent of R. C. Jennings, attempted to do any construction work (R. 734, 795, 797, 799, 802, 803). At no time did the general contractor, or his subcontractors, have any labor dispute with their employees. The construction work had to be suspended, and finally discontinued because the employees of the contractor and subcontractor refused to cross the picket lines established by the union, or extended by them so as to include the construction work.

ARGUMENT.

I.

Judgment of District Court, awarding damages for secondary boycott against the union is res judicata in unfair labor practice proceeding in which the union is charging party, and the respondent is the plaintiff in the action for damages.

It is impossible to reconcile the conclusions of the District Court affirmed in *United Brick & Clay Workers, etc.,* v. *Deena Artware, Inc.,* 198 F. 2d 637, and the order of the Board approved in the enforcement proceeding of *N. L. R. B.* v. *Deena Artware, Inc.,* 198 F. 2d 645. The lower court discussed the conflict on pages 642 and 643 of the opinion in the action for damages, and on page 653 of the enforcement proceeding. In discussing the picketing in the action for damages, the Court said:

> "The physical facts, as above described, show clearly that it was not necessary to extend the picket line around the area of construction in order to cover all the entrances to the existing plant and warehouse. The evidence also showed that the picketing of the area of construction was not continuous, but was in effect only when attempts were made to unload steel or to perform work on the area.
>
> * * * * * * *
>
> "We recognize that this finding is contrary to the finding in the companion case of N. L. R. B. v. Deena Artware, Inc., No. 11156, *supra,* in which the Trial Examiner found that the picketing of

the area of construction which caused the cessation of work by the general contractors was on the part of the Teamster's Union and not by the Appellants, which finding we have upheld and on which we have based a ruling in that case. Under our existing system of courts, juries, administrative agencies, and appellate review, such findings, even though inconsistent, are not invalid, and one does not destroy the other. The two proceedings, even though arising out of the same labor dispute, were heard by separate fact finding agencies. The witnesses in the two proceedings were not the same. The cross-examination of some witnesses who testified in both proceedings was not by the same attorneys. Necessarily, the evidence produced in the different proceedings by such testimony was not identical. Each fact finding agency was entitled to make its own decision upon the evidence before it. Though this Court on review recognizes the inconsistency, and may not be in accord with one of the two rulings if it was making the ruling as a matter of original jurisdiction, it does not have the right to set aside such ruling, if, in case of the jury verdict, it is supported by substantial evidence, or, in the case of the Labor Board proceeding, it is supported by substantial evidence on the record considered as a whole. In our opinion, the respective findings are so supported in each of the two proceedings."—198 F. 2d., pp. 642, 643.

The following is quoted from the opinion in the enforcement case:

"The 'secondary boycott' failure of the labor dispute herein involved is the chief issue in the case of United Brick & Clay Workers of America,

> etc., v. Deena Artware, Inc., 6 Cir., 198 F. 2d 637, a companion case to this case, arising out of the same labor dispute, and in which an opinion is being handed down at this time. A more extended discussion of the issue is made in the opinion in that case, and need not be repeated here. *As shown by that opinion, we do not agree with the ruling of the Board as a matter of law,* and are of the opinion that whether the Union was guilty of a 'secondary boycott' contrary to the provisions of Sec. 8(b) (4) (A) of the Labor Management Relations Act was a factual question for determination under the particular facts of the case. The Examiner found in favor of the Union. The finding is supported by substantial evidence on the record considered as a whole, and is accepted on this review. Accordingly, it becomes unnecessary to consider the legal sufficiency of Respondent's defense on this phase of the case."—198 F. 2d 653.

We respectfully urge that the irreconcilable conflict between the conclusions expressed in the opinions in the companion cases should be avoided, if possible, and in the interest of justice we insist that it is possible to avoid it. The same witnesses testified in both proceedings about the facts as to the picketing of the construction work. Attorneys for National Labor Relations Board did not participate in the trial of the action for damages. Attorneys for the Union participated actively in both proceedings. We stated in our petition that the question of Federal law discussed in this part of our argument had not been settled by this Court. A similar question was considered by the *New York Court of Appeals in New York State Labor Relations Board*

v. *Holland Laundry, Inc., et al.,* 294 N. Y. 480; 161 A. L. R. 802; 63 N. E. 2d 68. In that case, a judgment was entered in favor of an employer to enjoin a strike as violative of a collective bargaining agreement. The New York Court held that the judgment was not *res judicata* against the State Labor Board, in a proceeding in which the Board found that the bargaining agency of the employees was a company dominated union. The Court, speaking through Judge Lehman, held that the final judgment of the Court was conclusive and binding upon the parties in all subsequent litigation between them. While the distinction made between the Board and the employees is against our contention here, it can be distinguished, and of course the ruling is not a precedent binding on this Court. We are not familiar with the procedure before the New York Board. A labor board is, of course, a public agency. In such a proceeding as that against Deena Artware, however, it is acting upon charges presented by a union, and the Board acting for the union, should be bound by the judgment rendered against the union by the District Court.

In the case of *Evergreens* v. *Joseph D. Nunan, Commissioner of Internal Revenue,* 141 F. 2d 927; 152 A. L. R. 1187, the United States Court of Appeals of the Second Circuit made a distinction between an ultimate fact, and an evidentiary fact (referred to by the Court as mediate datum) as respects the effect of a judgment as estoppel. Applying the distinction here, it appears to us that the existence of a secondary boycott was an ultimate fact found by the District Court

in awarding judgment for damages. The conclusion was certainly essential to that judgment, and since it was necessary to the result in the action for damages, it should be binding on the union and on the Board acting for the union in the enforcement proceeding. Recognizing the distinction in *Commissioner of Internal Revenue* v. *Sunnen,* 333 U. S. 591, 68 S. Ct. 715, this Court said:

> "Of course, where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding, *even though the cause of action is different.*"

In the case at bar, the difference between the parties is nominal, not actual, the Board being the representative of the charging party. The cause of action is different. Neverthless we submit that the finding that the picketing was secondary, which was essential to the judgment in the damage suit, should be binding in the enforcement proceeding. All of the reasons sustaining the doctrine of *res judicata* would seem to be applicable here. In addition to these reasons, we may add the avoidance of such conflicting conclusions as are presented in these companion cases.

II.

A finding that petitioner was guilty of unfair labor practices on evidence not germane to the charges or the complaint was erroneous.

In the petition we have pointed out that the unfair labor practices charged are alleged to have commenced on or about April 8, 1948. The meetings of the bargaining committees began on April 8th, and petitioner was charged with failure to bargain in good faith. In the paragraphs of the complaint referred to (A. pp. 41, 43), the Board set out the case against the petitioner. Petitioner was not required to anticipate that an effort would be made to rest the case on statements made by George H. Weiner, President of the petitioner, at times not referred to in the charges, or the complaint. We had a right to regard this evidence as incompetent and we did not have Weiner present to testify about it. The findings of the Board are outlined by the Court in the first numbered paragraph of the opinion. It will be noted that they rest upon statements made and things done by the President of petitioner before April 8th, and on or about July 22d, when he gave an interview to a local paper. On July 22d, the boycott had caused a suspension of the construction work on petitioner's new plant, and the events considered in the evidence had ended. We quote from the opinion:

> "The threats of Respondent's President to withdraw the employees' privileges and freedoms, his references to stabs in the back, the revocation of various privileges after the election, his warn-

ing that it would not be his fault if the employees were out of work or starving, and the statement in the newspaper about discontinuing expansion of the plant at Paducah and possible abandonment of the plant entirely if hazards and difficulties were thrown in his way, fully sustain the Board's conclusion."

A reading of the opinion and the order of the Board supports our argument that the findings of the Board and the lower Court were based on statements and acts not referred to in the charges or the complaint. We have pointed out that hundreds of pages of testimony was heard, as to what transpired at the bargaining meetings. According to the complaint, this was the important matter. There appears to be no finding by the Court adverse to the petitioner as to the conduct of the bargaining.

> "Conviction upon a charge not made would be sheer denial of due process. DeJonge v. Oregon, 299 U. S. 353, 363, 57 S. Ct. 255, 259, 81 L. Ed. 278; Stromberg v. California, 283 U. S. 359, 367, 368, 51 S. Ct. 632, 535, 75 L. Ed. 1117, 73 A. L. R. 1484." —*Thornhill* v. *State of Alabama,* 310 U. S. 88, 60 S. Ct. 736.

III.

There can be no innocent unfair labor Practice.

We have pointed out in our statement the circumstances under which the so-called strike began. Neither the Board nor the Court has found that the respondent was in any way at fault in the matter of postponing the

meeting set for May 26th. If there had been any oversight or omission on the part of the respondent in this connection, most certainly it would have been brought out. After the case was remanded, we showed the facts relative to the action taken by the Union at its meetings and showed further that there was no compliance with the provisions of the Constitution of the Union (Opinion of the Court, page 9). If this had been a strike provoked by the unfair labor practice of the respondent extending back to March 16th, or even extending back to April 8th, there would have been abundant time for the Union to take the necessary steps to comply with the requirements of its own constitution and to have the strike approved and duly authorized. Its failure to take any of these steps not only shows that the strike was unauthorized, it also shows that it was called on the spur of the moment, as the result of the childish anger of a union official. All of the circumstances surrounding this work stoppage of May 26th showed that it was not a planned protest against continuing unfair labor practices, but was a sudden flare-up, resulting from the anger of Bellew. This is shown not only by the failure to comply with the union's constitution, but by the quick realization on the part of the union that the strike should not have been called and should be speedily terminated, if possible. Within less than three (3) days, the union members who had gone out on strike wanted their jobs back. There had been no change in the attitude of the management of this respondent as to the alleged unfair labor practices. If the strike had been a protest against unfair labor prac-

tices, why did the strikers suddenly determine to abandon the protest? The truth is that the strikers realized by Saturday, May 29th, that they had abandoned their jobs without cause or justification; that they were in an untenable position and, if possible, should abondon the so-called strike. All of this shows the real cause of the strike, which was the failure of Garth Ferguson to give notice to Bellew of the postponement of a meeting. The unfair labor practice evidence is built up as an afterthought, to justify hasty and ill-considered action.

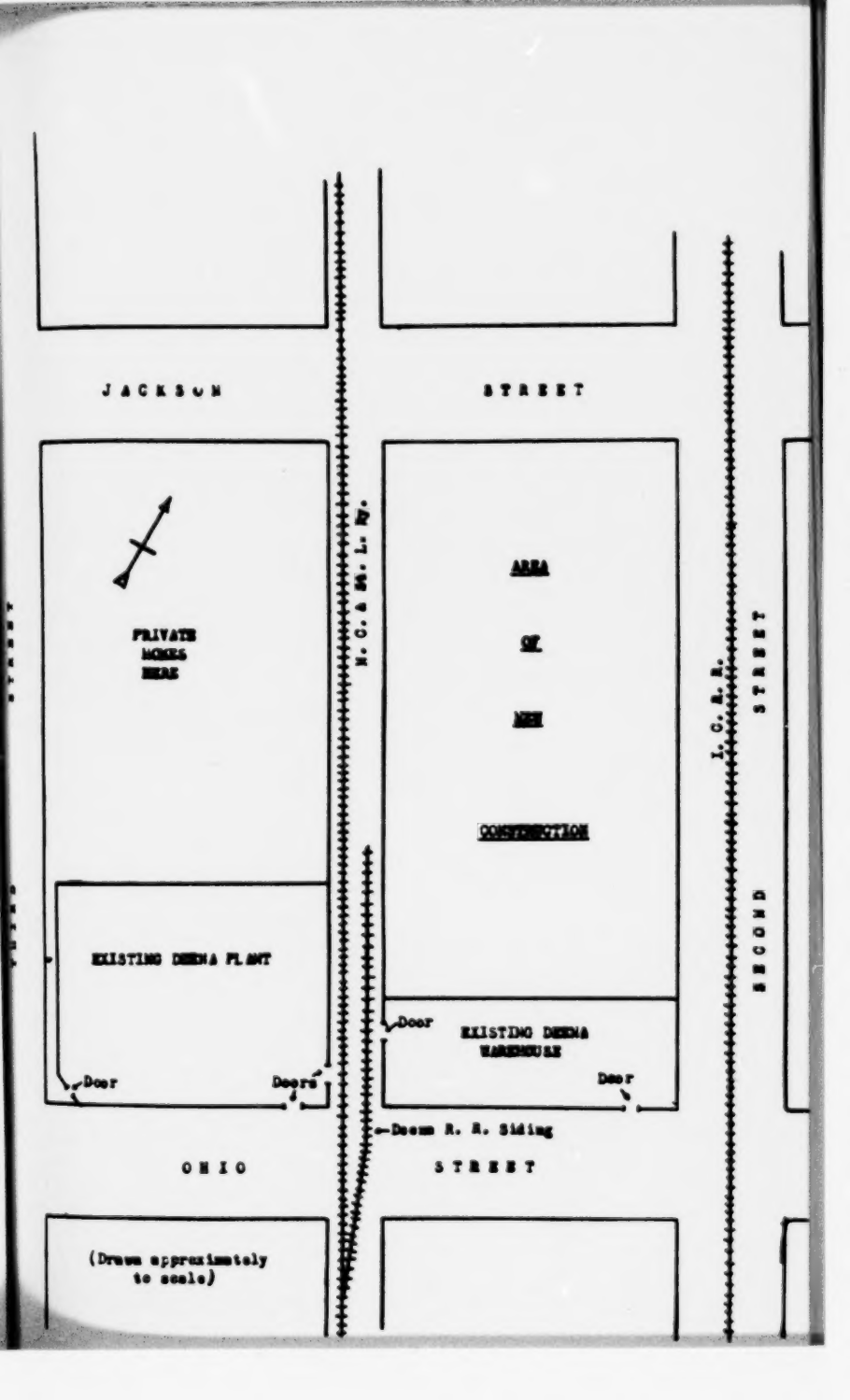
In connection with the conduct of the petitioner on May 26th, when a large number of its employees quit work, the Court said:

> "Fault on the part of the respondent is not a necessary element."

An unfair labor practice is a wrongful act; there cannot be an innocent unfair labor practice. The penalties for such guilt are costly and severe. They should not be imposed on a party not in fault.

Respectfully submitted,

JAMES G. WHEELER,
Attorney for Appellant.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Deena R. R. Siding
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(Drawn approximately
to scale)

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 518

DEENA ARTWARE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 1150–1162) is reported at 198 F. 2d 645. The findings of fact, conclusions of law, and order of the Board (R. 60–177, 191–199, 985–999, 1001–1004) are reported at 86 NLRB 732 and 95 NLRB 9.

JURISDICTION

The judgment of the court below (R. 1149–1162) was entered on July 30, 1952. A petition for rehearing filed by petitioner on August 14, 1952 (R. 1163) was denied on October 1, 1952 (R. 1179). The petition for writ of certiorari

was filed on December 29, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

Petitioner's question numbered 1 (Pet., p. 3)—whether a finding by a jury in the District Court that the Union violated Section 303 (a) (1) of Title III of the Act is *res judicata* so as to preclude the Board from finding that the Union did not violate Section 8 (b) (4) (A) of Title I of the Act—was not properly put in issue before the Board or the court below. See *infra,* pp. 16–17.

The other questions presented are:

2. Whether evidence of events occurring before and after the unfair labor practices alleged in the complaint may be introduced for the purpose of showing the character of the conduct alleged to be unfair.

3. Whether substantial evidence on the record considered as a whole supports the finding of the Board, affirmed by the court below, that a strike engaged in by petitioner's employees was caused by petitioner's unfair labor practices and by petitioner's refusal to accede to the employees' economic demands.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29

U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 23–27.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The Board found that petitioner interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act; refused to bargain in good faith with the certified bargaining representative of its employees, in violation of Section 8 (a) (5) and (1); and discriminatorily refused to reinstate 66 strikers, in violation of Section 8 (a) (3) and (1). The subsidiary facts upon which the Board based its findings may be summarized as follows:

1. *Interference, restraint, and coercion.* In a Board-conducted election held March 17, 1948, a majority of the Company's employees designated the United Brick and Clay Workers, AFL, as their exclusive bargaining representative, and thereafter the Board certified the Union as such representative (R. 65; 291, 885).[1] Prior to the election, as well as thereafter, the Company openly expressed its opposition to the Union, and sought in various ways to thwart the employees' union activities.

Thus, on March 16, 1948, the day preceding the election, G. H. Weiner, the Company's president,

[1] Wherever semicolons appear in record references, the references preceding the semicolon are to the Board's findings and those following are to the supporting evidence.

warned the employees that they would lose their "privileges and freedoms" if the election were won by the Union (R. 68; 282, 546). A day or two after the Union won the election, Weiner told the employees of the Casting Department that he was "going to show 'em" what he would do for "stabbing" him in the back, and he threatened to eliminate all of their overtime earnings (R. 68–69; 786). About the same time, Weiner made a similar remark to the employees of the Mold Department, stating that he was "real mad" because they chose the "side" of the Union (R. 68, 69; 820–821, 823). Early in April, shortly after the commencement of the negotiations between the Union and the Company (discussed *infra,* pp. 5–8), Weiner summoned the Union's negotiating committee to the plant office and there, in the presence of the management committee which represented the Company in collective bargaining, "starting shaking his finger" at the leaders of the Union committee and told them that "if you people are out of work and starving it won't be my fault" (R. 70, 92; 262–263, 280).

Within a few days after the March 17 election, the Company gave effect to its threats. It reduced the employees' working hours from 48 to 40 hours per week, thereby eliminating the employees' overtime earnings (R. 69; 395, 400, 647, 649, 786). It posted signs throughout the establishment prohibiting smoking, and informed the employees that if they were "caught smoking" outside the

rest room they "would be discharged immediately" (R. 71; 271–272, 298–299, 304–305, 543). The Company also abolished the practice of permitting employees who had completed their day's work to walk outside the plant, to take showers, and to clean their tools preparatory to departure (R. 72; 273, 307, 299, 302–303, 543); and revoked the privilege of interchanging work shifts customarily enjoyed by the kiln employees (R. 72; 288–289).

Finally, on July 22, 1948, while the employees were engaged in a strike (*infra,* pp. 8–9), President Weiner publicly announced in a Paducah newspaper that, because of the strike activities of the Union and the employees, he was discontinuing the construction of additional plant facilities at Paducah, was moving the construction materials to another community where he intended to erect a factory, and was abandoning plans "to move our entire operation over a period of time into Paducah" (R. 165; 317, 900–903). Weiner also stated that he would entirely abandon the Paducah plant if "hazards and difficulties are thrown in my way" (*ibid.*).

2. *Petitioner's refusal to bargain in good faith.* Having won the election conducted by the Board on March 17, 1948, the Union immediately thereafter requested the Company to negotiate a collective bargaining contract (R. 66; 202). The parties met for this purpose on several occasions between April 8 and May 7, 1948.

At the second bargaining conference held on April 9, the Company announced that it would not bargain with the Union so long as it retained E. Grimes, an AFL official, on its negotiating committee (R. 66; 205–206, 295, 330–331). Contending that Grimes was not "a member or officer" of the Union, the Company "ordered" him "off the Company property" where the meeting was in progress (*ibid.*). The Union yielded under protest and Grimes did not participate in any further negotiations between the parties (R. 66, 75; 205–206, 295, 330–331).

At the third meeting, the first one on which the parties came to grips over the major issues in dispute, the Company equivocated concerning the authority of its representatives to bind the Company on important issues. The members of the Company's committee gave varying and irreconcilable versions of the committee's authority, ranging from the construction that the committee's actions were "binding on the company" to the construction that "all of the committee's actions" were subject to veto by the Board of Directors or President Weiner (R. 90–91, 192; 207, 220, 283, 338, 415, 532, 533, 669). In the course of the negotiations, President Weiner himself told a union representative that the negotiations were "entirely" in the hands of his attorney who "had full power to act for the Company" (R. 91–92; 259–260).

At the succeeding meetings the parties discussed various provisions of the Union's proposed contract, including those relating to wages, union security, overtime, sick leave, holiday and vacation proposals (R. 86, 96–100; 210–212, 217–224, 256, 340, 342, 345, 347, 607, 679–680). Although the parties were able to agree upon certain minor matters, no agreement was reached on the major issues (R. 86; 221, 219). The Company not only rejected the Union's proposal to continue the established vacation practice of the Company, but proposed to reduce the existing vacation benefits (R. 99; 208–209, 217–218, 222, 413, 888, 901). Although the Company submitted a counter-proposal on wages, the proposal was made orally, and was so complex that even members of the Company's negotiating committee differed among themselves at the hearing in regard to some of its broad and vital aspects, including the over-all impact of the proposed wage scale on the current earnings of the employees (R. 101, 104, 192; 311, 365, 408–409, 675–676, 683–684). And although the employees repeatedly informed the management committee that its wage proposal was without substantial value or meaning to them (R. 101, 192; 268–270, 284, 681), the Company made no effort to clarify it, but instead told the Union that even that offer might later be withdrawn by management (R. 88, 101, 192; 220, 815, 833, 867).

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3. *The strike against the Company.* On May 7, 1948, following the last bargaining conference, the Union held a meeting at which the employees concluded that they had gone "as far as [they] can get in negotiations" and unanimously voted to "go on strike * * * due to the breaking off of negotiations by the Company" (R. 108, 991; 223, 226, 227, 1101–1102). The membership also voted to give Earl Bellew, the Union's international representative "full power and authority to name the day and hour of the strike" (*ibid.*). Bellew decided, however, to postpone the strike until the United States Conciliation Service, whose assistance the parties had previously invoked (R. 108; 219, 224, 225), was given "a chance" to adjust the dispute (R. 108–109, 991; 227–228, 1102).

Thereafter, the Conciliator assigned to the case arranged to meet the representatives of the Union and the Company on May 26 at the offices of the Company's attorney (R. 109; 246–247). The Conciliator, unable to keep the appointment, notified the Company that the meeting would be postponed to May 28 (R. 109; 376). However, because of the Conciliator's difficulty in reaching Bellew, the Union's representative, Bellew did not receive notice of the postponement until May 27, the day following the originally scheduled meeting (R. 109; 246, 250, 376).

In the meantime, Bellew, together with several members of the Union's committee appeared at

the office of the Company's attorney for the May 26 meeting but were told by an office clerk that the meeting had been postponed until May 28 (R. 109; 228–229, 247–248). After receiving a report of this development, the employees agreed that the strike, which they had decided upon at their May 7 meeting (*supra,* p. 8), be put into effect at 2 o'clock that afternoon and Bellew instructed one of the employees so to advise the Company (R. 109–110; 228–230, 248–249, 376).

Pursuant to Bellew's instructions, one of the employees apprised the Company of the Union's strike plan (R. 110; 275). When the Company's representatives asked the employee the reason for the strike, he replied that the May 26 meeting was postponed without notice to the Union and that the Union objected to "getting the run-around" (R. 110; 376). Thereupon the Company's representatives explained that the Conciliator, and not the Company, was responsible for the postponement (*ibid.*).

Sixty-six employees, substantially the entire membership of the local, responded to the committee's strike call (R. 110; 231, 313–314). Picketing activities commenced the same day (R. 110–111).

During the period of the strike, an independent contracting firm was engaged in constructing a new warehouse on the Company's premises; the structure was to be physically joined to the Company's existing warehouse (R. 157, 194, 1003;

the Act (R. 191–193, 64–166, 985–1004). In reaching their conclusion, the trial examiner and the Board rejected the Company's contention that the strike was not a protected concerted activity; this contention was based on the claim that the strike was caused by the Union's displeasure at the postponement of the May 26, 1948 meeting for which the conciliator, and not the Company, was responsible (R. 114–116, 990–995, 1002). The Board found that although the strike was touched off by the postponement of the May 26 meeting for which the Company was not responsible, it was in fact basically provoked by the Company's antecedent unfair labor practices and its refusal to grant the employees' economic demands (*ibid.*). The trial examiner and the Board also rejected the Company's contention that, in any event, the strikers forfeited their right to reinstatement because, among other things, they engaged in an illegal secondary boycott, in violation of Section 8 (b) (4) (A) of the Act (R. 157–162, 194–195, 995–998, 1002–1004). As already stated (*supra,* pp. 10–11), the trial examiner found as a fact that the cessation of work by the construction workers was induced or encouraged not by the Union involved in this proceeding but by the Teamsters Union. The Board, although adopting the trial examiner's factual findings, concluded that the undisputed fact that the picketing was confined to the Company's immediate premises alone warranted the conclusion that it

was protected primary picketing (R 194–195, 1002–1004).

Accordingly, the Board entered a customary remedial order requiring the Company to cease and desist from engaging in the unfair labor practices found; to reinstate and make whole the strikers it had discriminated against; upon request, to bargain collectively with the Union; and to post appropriate notices (R. 195–197).

C. THE PROCEEDINGS IN THE COURT OF APPEALS

On May 8, 1950, the Board filed in the court below a petition for enforcement of its order (R. 1–7). On July 30, 1952, with an immaterial modification (R. 1160), the court below handed down its opinion and entered its decree (R. 1149–1162) enforcing the Board's order in full. The court approved the Board's finding that the strike called on May 26, 1948, was a protected concerted activity, pointing out that although the Company's proof "tended to establish that the postponement of the [scheduled bargaining] meeting touched off the strike, * * * considering the events in their entirety, of which the postponement incident was but a single incident, the [Company's] unfair labor practices and the employees' economic demands were the root causes of the strike" (R. 1158). The court also sustained the Board's conclusion that the strike did not constitute illegal secondary action in violation of Section 8 (b) (4) (A) of the Act. The

court held that substantial evidence on the record as a whole supported the finding of the examiner, adopted by the Board, that the Union did not induce or encourage work stoppages by the construction workers and that any cessation of work by them was induced by the Teamsters, a union not involved in this proceeding (R. 1161). The court recognized that the trial examiner's finding as to the character of the picketing was "inconsistent" with the finding reached by a jury in a proceeding instituted by the Company in the District Court for the Western District of Kentucky, wherein the Company obtained a judgment, under Section 303 of the Act, for damages sustained by the Company by reason of secondary picketing arising out of the same labor dispute (R. 1161–1162; *Brick & Clay Workers of America* v. *Deena Artware, Inc.*, 198 F. 2d 637, 642–643 (C. A. 6), certiorari denied, December 8, 1952). In its opinion in *Brick & Clay Workers,* the court pointed out, however, that such disparity in findings was an inevitable consequence of the statutory creation of two forums for dealing with the same labor dispute; that "each fact finding agency was entitled to make its own decision upon the evidence before it"; and that because both decisions were supportable on their separate records, involving different witnesses and different cross-examination of the same witnesses by different counsel, both were entitled to stand (*ibid.*).

ARGUMENT

On the same day that the decision below was handed down, the court also rendered its decision in *Brick & Clay Workers of America* v. *Deena Artware, Inc., supra,* affirming the judgment of the District Court awarding damages against the Union. In both cases the court below stated that it disagreed with the Board as to the standard that the Board applied to distinguish primary and secondary labor action. Based in part on that disagreement, the Union filed a petition for certiorari in the *Brick and Clay Workers* case, which this Court denied on December 8, 1952, No. 419, October Term, 1952. The petition in this case does not present the question as to the proper standard for differentiating between primary and secondary labor action. The court below also held that the Board's order could be sustained on the alternative theory, based on the standard the court regarded as proper, that the Union had engaged in no secondary labor action. As to this, the court held that the findings of the examiner, adopted by the Board, were supported by substantial evidence and warranted the Board's conclusion. The petition in this case does not deny that the examiner's findings are supported by substantial evidence. The only issue petitioner raises as to the relationship between the two cases is that of *res judicata,* to which we now turn.

1. Petitioner contends that the jury's finding in the District Court proceeding that the Union

violated Section 303 (a) (1) of Title III of the Act is *res judicata* so as to preclude the Board from finding that the Union did not violate Section 8 (b) (4) (A) of Title I of the Act. We shall show that this question (a) is not properly before this Court because not put in issue before the Board or in the court below, and (b) does not, in any event, warrant review.

(a) The District Court judgment was entered on December 15, 1950 (R. 1117). The Board's original order had been entered on October 25, 1949 (R. 101), but on October 12, 1950, the court below granted petitioner's motion to remand the case to the Board to permit petitioner to adduce additional evidence on several matters, including the Union's alleged violation of Section 8 (b) (4) (A) of the Act (R. 979). Neither then, nor previously, nor at the ensuing hearing, held on January 8, 1951, after the District Court judgment was entered (R. 985–987) nor in subsequent proceedings before the Board, did petitioner urge that the District Court judgment was *res judicata*. In the court below, petitioner did not raise this issue at any stage before the court's decision was rendered. After the decision, petitioner urged its *res judicata* contention for the first time in its petition for rehearing (R. 1169–1172), which the court below denied without opinion (R. 1179).

Even if this injection of the issue for the first time on rehearing were otherwise timely, the court below could not consider it, for Section 10 (e) of the Act requires that "No objection that has not

been urged before the Board * * * shall be considered by the court" in the absence of extraordinary circumstances. *National Labor Relations Board* v. *Seven-Up Bottling Co.,* No. 217, this Term, decided January 12, 1953, slip sheet op. p. 6. Accordingly, petitioner requests this Court to consider a question which the Board had no initial opportunity to determine and which could not be reviewed by the court below. Certiorari will not be granted to review a question "not properly raised, litigated or passed upon below". *McCullough* v. *Kammerer Corp.,* 323 U. S. 327, 328.

(b) In any event, the question petitioner poses is insubstantial. It has been settled by this Court that a Section 303 damage action is an independent proceeding which does not affect and is not affected by the administrative determination of the parallel question arising under Section 8 (b) (4). *International Longshoremen's and Warehousemen's Union* v. *Juneau Spruce Corp.,* 342 U. S. 237, 243–244. There this Court stated that:

> Section 8 (b) (4) (D) and § 303 (a) (4) are substantially identical in the conduct condemned. Section 8 (b) (4) (D) gives rise to an administrative finding; § 303 (a) (4), to a judgment for damages. The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that *the remedies provided were to be independent of each other.* Certainly there is nothing in the language of § 303 (a)

> (4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true. For the jurisdictional disputes proscribed by § 303 (a) (4) are rendered unlawful *"for the purposes of this section only,"* thus setting apart for private redress, acts which might also be subjected to the administrative process. [Emphasis supplied.]

The relationship of Section 303 (a) (4) to Section 8 (b) (4) (D), as in *Juneau Spruce,* is the same as the relationship of Section 303 (a) (1) to Section 8 (b) (4) (A), as in this case. Accordingly, in this case, as in *Juneau Spruce,* the private remedy under Section 303 (a) (1) and the public remedy under Section 8 (b) (4) (A) are "independent of each other" and the Section 303 (a) (1) damage judgment is pertinent "for the purposes of * * * section [303 (a) (1)] only."

Furthermore, it is axiomatic that a determination in a judicial proceeding is binding only upon the parties to that proceeding and those in privity to them. *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.,* 225 U. S. 111, 126; *Litchfield* v. *Goodnow's Administrator,* 123 U. S. 549. In the Section 303 damage suit, only petitioner and the Union were parties, and the Board did not participate in the proceeding in any capacity. Petitioner attempts to bridge the gap by asserting that the Board and the Union are in privity

(Pet., pp. 5, 15). But it is fundamental that the Board acts in a public capacity to vindicate a public right in the public interest. *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261, 265, 268–269; *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 362, 364. The Board does not represent, and is not represented by, private interests. *Ibid.;* see also, *Lane* v. *National Labor Relations Board,* 186 F. 2d 671, 674–675 (C. A. 10). Accordingly, since the Board did not participate in the private proceeding, there is no basis for binding the Board to the result reached in it.

In addition, if *res judicata* were otherwise applicable, there is no chronological basis in this case for according the District Court judgment precedence over the administrative determination. In this case the Board proceeding was actually instituted prior to the commencement of the Section 303 proceeding (R. 60; 34–39, 40, 1111); the Board's original finding respecting the protected character of the picketing antedated the finding by the jury in the District Court (R. 191, 157–162, 1117);[3] the Union took a timely appeal from the

[3] The original order of the Board and the judgment of the District Court were entered on October 25, 1949 and December 15, 1950, respectively (R. 191, 1117). Although the Board, pursuant to an order of the court below, reopened the proceeding on November 13, 1950, to receive further evidence on several matters, including the character of the picketing (R. 978), the evidence adduced thereafter by petitioner was largely cumulative and the Board reaffirmed its original decision (R. 985, 1001).

judgment of the District Court; and the court below determined the issues in the District Court case and the Board case simultaneously and sustained the results reached in both (*supra,* pp. 13–15). In these circumstances, the doctrine of *res judicata,* by definition, could not apply so as to subordinate the administrative to the private determination, for the private suit did not result in a final prior adjudication.

Lastly, if there is any room for *res judicata,* it would seem to require that precedence be given to the administrative determination, for only in that proceeding were all parties joined. And permitting the administrative determination to prevail would have the added advantage of giving effect to the expert judgment. See Comment, 61 Yale L. J. 745 (1952).

2. It is settled, contrary to petitioner's contention (Pet., pp. 5–6, 16–17), that evidence of events occurring before and after the unfair labor practices alleged in the complaint may be introduced for the purpose of showing the character of the conduct alleged to be unfair. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 268–270; *National Labor Relations Board* v. *Newport News Shipbuilding and Dry Dock Company,* 308 U. S. 241, 244–248; *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 705; *National Labor Relations Board* v. *Clausen,* 188 F. 2d 439, 443 (C. A. 3), certiorari denied, 342 U. S. 868; *National Labor Relations*

Board v. *Wallick & Schwalm,* 198 F. 2d 477, 483 (C. A. 3); *Angwell Curtain Co.* v. *National Labor Relations Board,* 192 F. 2d 899, 903 (C. A. 7). In any event, even if the evidence to which petitioner objects were excluded, the remaining evidence is ample to sustain the Board's findings.

3. Petitioner contends (Pet., pp. 4, 6, 17–19) that the employees' work stoppage on May 26, 1948, was not caused by petitioner's unfair labor practices and its refusal to grant the employees' economic demands, but only by International Representative Bellew's "anger" and "annoyance" at the Conciliator's failure to apprise him of the postponement of a scheduled negotiation conference, for which the Company was not responsible. This raises only a question of the sufficiency of the evidence to support the Board's finding regarding the cause of the strike. The "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175, 178. In any event, the Board's finding, sustained by the court below, is amply supported.

Moreover, as the court below concluded (R. 1159), even if the strike were caused only by postponement of the bargaining meeting, as petitioner maintains, the strike nevertheless remained a concerted activity protected under the statute, and petitioner's refusal to reinstate the employees for engaging in it was a violation of the Act. For at the most, petitioner would have established that

the employees were unjustified or ill-advised in resorting to strike action. But "the wisdom or unwisdom of the men, their justification or lack of it, in attributing to [petitioner] an unreasonable or arbitrary attitude in connection with the negotiations," is immaterial to the protection the Act extends to employees on strike. *National Labor Relations Board* v. *MacKay Radio & Telegraph Co.*, 304 U. S. 333, 344–345; *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F. 2d 633, 635 (C. A. 2); *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 902 (C. A. 3).

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY, 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * * (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided

in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * * *

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. * * *

(b) Whoever shall be injured in his business or property by reason or [*sic*] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

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